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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1052

FLOYD PRICE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in this proceeding.

OPINION BELOW

The judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on October 22, 1979 is an unpublished order and is attached hereto as Appendix A. The order of the United States Court of Appeals for the Seventh Circuit entered on December 5, 1979 denying the petition for rehearing *en banc* is attached hereto as Appendix B.

JURISDICTION

The judgment of the court of appeals on which this Petition is based was entered on October 22, 1979. The order of the Court of Appeals denying the petition for rehearing *en banc* was entered on December 5, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(l).

QUESTIONS PRESENTED

1. Whether the denial of the right of cross-examination of a main government witness which would have showed bias can be deemed harmless error.

2. Whether the United States Court of Appeals for the Seventh Circuit's expansion of the Hobbs Act has impermissibly gone beyond the intent of Congress in enacting the statute.

CONSTITUTIONAL PROVISIONS INVOLVED

The text of Amendment VI of the United States Constitution is set out at Appendix C, page 12a.

STATUTORY PROVISIONS INVOLVED

The text of 18 U.S.C. Section 1951 is set out at Appendix C, page 12a. The test of Chapter 38, Section 33-1(d), Illinois Revised Statutes, is set out at Appendix C, page 13a.

STATEMENT OF THE CASE

Proceedings Below

Petitioner was charged in an eleven-count indictment with violations of extortion under color of official right in violation of 18 U.S.C. Section 1951. In the course of a trial by jury, the Court dismissed Count nine and the jury found the defendant guilty of the other ten counts. Notice of appeal was timely filed, and the United States Court of Appeals for the Seventh Circuit affirmed defendant's conviction on October 22, 1979. Petitioner's motion to request a rehearing *en banc* was denied on December 5, 1979.

Statement of Facts

The case revolved around five contractors or electrical workers who testified that on various dates in the years 1974 through 1978 they gave money to Floyd Price, who was employed as an Electrical Inspector for the City of Chicago Bureau of Electrical Inspection. A breakdown of the counts as to contractors may assist this Court in evaluating the case.

Service Electric (Counts 1 and 4)

Count	*Date*	*Amount Paid*
1	9/4/74	$500
4	1/16/76	$150

Frank Neylon, the president of Service Electric, testified that Service Electric is involved in the electrical contracting business, that they bought their electrical supplies, particularly their copper, primarily from Englewood Electric Supply in the City of Chicago. He

testified that to the best of his knowledge copper is not mined in the State of Illinois. He also testified that one of his supervisors was Matt Ott, who had come to him on some occasions for money for Floyd Price, the electrical inspector. In 1974 there was a job at 1710 North Kostner in Chicago, a food store, at which time Matt Ott had come to him and told him that he needed money for Price and that unless a $500 payment was made there would be a "nitpicking" inspection of the job. He put $500 in an envelope and gave it to Ott. He also entered into a book which he kept that the money was paid to Ott on behalf of Nolan and Price, City Inspectors, regarding 1710 North Kostner, $500, and the date of 9/10/74.

He testified that in 1976 Service Electric did a job at the Lowell School on West Evergreen in Chicago and that Ott came to him in January of 1976 and told him that there was a problem with a ceiling heater that did not have an Underwriters Laboratory (UL) label and that Price wanted $150 to overlook the missing label. (Tr. 712.) Neylon took the $150 out of the petty cash fund, put it in an unmarked envelope, and left it with Ott. He also entered into his book the notation of $150 given to Ott regarding Lowell, January 16, 1976.

Neylon testified under a grant of immunity. (Tr. 715.)

Ott then testified for the government that he was a supervisor for Service and that in 1972 he was working on the Ryerson School job. Over objection of the defendant, but pursuant to Rule 404(b), the court allowed him to testify that in 1972 he paid $150 to Price because certain units at the Ryerson School did not have the UL approval. He further testified about delivery to Price of the envelopes that he received from Mr. Neylon concerning the jobs that Neylon had testified about earlier.

Lee Roy Harper
(Counts 6, 7, 8, 9 and 10)

Count	*Date*	*Amount Paid*
6	6/76	$125
7	7/76	$125
8	9/12/76	$275
9	9/21/76	$250
10	10/26/77	$375

Lee Roy Harper was a person who practiced electrical contracting illegally within the City of Chicago. Lee Roy Harper had taken the examination to be a licensed contractor in the City on two occasions, but flunked the test. (Tr. 44.) Notwithstanding that, he continued to work in the City in violation of Chicago Municipal Code, Chapter 86, Section 86-16. The defendant submits that Harper's testimony is so jumbled and disjointed it is impossible to recreate with any degree of clarity in this brief, but an attempt will be made:

Harper testified that in October, 1975 he was working as an electrical contractor on Hubbard Street and received a violation ticket from Mr. Price. In June of 1976 Price told him it would cost him $125 for a permit on that job. (Tr. 72.) Harper then testified that the conversation took place in October or September of 1977. (Tr. 73.) Harper then looked at a report, refreshed his recollection, and changed his testimony that the conversation was in June of 1976. (Tr. 77.) At this point no further testimony was given about this job. He was then questioned about addresses on North Monticello, South Winchester and West Iowa. He testified that he purchased copper and wire for the job on Monticello from Southeast Electrical Supply. He received notice from the City on the Winchester address in early July, and he was granted time to get a permit. At the Iowa Street and Monticello

Street addresses he went to see Price to get some help in getting a permit. He was told that the job was in court and that he could be fined $200 a day. This was in October of 1977.

At this point in this jumble of testimony by Harper, the Court asked if the government had any other witnesses but Harper to support these counts. When the government said they had not, the Court said frankly that he could not see how any finder of fact, whether it be a judge or a jury, could find anybody guilty beyond a reasonable doubt on Counts 6, 7, 8, 9 or 10 on the basis of what they had heard from the witness. The trial judge further said that if he were sitting on a reviewing court, the government would have to be awfully persuasive to convince him there was a question for the jury on those counts with the standard of proof beyond a reasonable doubt. The district court judge said that it appeared to him that the man was not certain enough about anything to meet the standard. The government candidly admitted at that point that they had pretried the witness about five different times and he told them five different stories. (R. 96.)

Harper also testified about two jobs at 9926 and 9930 South Throop Street, and that each job had cost $125 for two permits. That testimony was stricken, however, by this Court. (Tr. 178.) Harper then testified about October 26, 1977 (Count 10), and the Court admitted, over objection of the defense, the tape recording and the transcript of that tape (Govt. Exhibits 5I and 5J). Count 9 of the indictment charged an offense on or about September 21, 1976, and the government moved to amend it to read September 21, 1977. The Court denied the motion and dismissed the count on the grounds of fatal variance. (Tr. 439.)

Harper testified that he had $375 with him in October of 1977 and the money was to get permits for North Monticello, West Erie, and 846 Winchester. He paid the money because he wanted to obtain the permits for each job. (R. 272.) He said that he had paid the money in order to keep from going to court or face a penalty of jail or a fine. (Tr. 273.) In June of 1976, he paid $125 to Price regarding Hubbard Street properties. (Tr. 275.) In June or July of 1976 he paid $125 for a permit at 633 North Sawyer. (Tr. 276.) On August 5, 1976 Harper was told it would cost him $150 for a permit on the Quincy Street job. Two days later Harper gave Price that money in a car at about 7:00 in the morning. (Tr. 290.) Harper testified that the money came from company funds and he bought electrical equipment from Southeast, Southtown, Englewood and Harlow Electric.

On cross-examination, Harper admitted that he did not file an income tax return for 1977; he was not sure if he filed in 1976 and he did not file a state income tax return in 1977. On cross-examination the attorney for the defendant asked the simple, non-leading, non-suggestive question:

> "Did you ever have occasion to discuss with any agent of the government, the United States government, the fact that you have not filed income tax returns for the year 1977 and maybe not for the year 1976?"

The Court would not allow the question to be asked unless, if the witness said "No", the defense was able to show that there was such a conversation. The Court ordered any reference to that question stricken and the jury to disregard it. (R. 374.) Later, in closing argument, when the defense argued that Harper had a motive to testify falsely because he had income tax problems, the Court struck reference to that as well. (Transcript, February 26, 1979, page 40, supplemental record.)

On cross-examination the witness admitted that he may have told the FBI that he paid Price $150 for the Quincy Street job and $125 for the Hubbard Street building on September 12. (Tr. 409.) The defense brought out from the witness that he had told FBI agent Bell in July of 1978 that in June or July of 1976 he paid $125 for Hubbard Street and that in October 1978 he told him he paid $125 for the same job in September of 1976. (Tr. 414.) When again the defense tried to show that the witness had income tax problems (his wilful failure to file an income tax return is a criminal offense punishable with up to one year in jail, 26 U.S.C. Sec. 7201), the Court, without objection from the government, interjected and stated that the reference to income tax would be stricken and the jury was instructed to disregard it. (Tr. 451.) The Court told the jury the reason was that "you cannot throw out a suggestion in the question and then have it denied and leave the thoughts in the minds of the jury if you are not going to follow it up with proof." (Tr. 451.) This was said notwithstanding the fact that counsel for the defendant pointed out that Harper already testified he did not file any income tax returns for one year and may not have filed for another year. The Court then cut off the cross-examination totally by telling counsel that he had five more minutes of cross-examination. (Tr. 452.)

Lovchen Electric
(Counts 2, 3 and 5)

Count	*Date*	*Amount Paid*
2	5/10/75	$100
3	6/12/75	$ 30
5	5/13/76	$100

Raymond Lumovic said that he operated Lovchen Electric, which is licensed to do work outside of the City of Chicago but not within the City of Chicago. He was doing a job in mid-1975 on North Sacramento in Chicago. The owner of the building had received a notice from the electrical department of certain violations of the electrical code. After completing the job, Lumovic called the office of the electrical department for an inspection and Price came out to the job. Price inspected the job, confirmed it was okay, and assured the owner, who was also present, that everything was okay. Without request and without conversation, Lumovic gave Price $100. (Tr. 467-468.)

On one particular day in May of 1975 Lumovic called Price to inspect a job at 3745 West Hirsch. Price came by to inspect the job, said everything was fine, and then Lumovic, with no inducement or request by Price, gave Price $30. (Tr. 471.) In October of 1976, Price inspected a job at 1537-43 East 63rd and told Lumovic the job was all right, after which Lumovic gave him $100. (Tr. 469.)

When asked on direct examination by the prosecution why he made the payments, Mr. Lumovic said he learned in the past "you cannot be in business for some of the jobs if you don't pay." (Tr. 474.) He felt that if he did not pay this time, he would automatically get called back later and have to pay twice for something on the same job. Objections to that line of questioning were overruled. (Tr. 474.)

On cross-examination he admitted that Price never demanded any money, that he, Lumovic, just gave him the money voluntarily. Price never told him that he had to give him the money or what was going to be done with the money. (Tr. 494.)

Lovchen purchased electrical equipment from Southtown and Southeast Electrical Supply.

Hargrett Electric (Count 11)

Count	*Date*	*Amount Paid*
11	4/78	$300

James Hargrett, who is self-employed with Hargrett Electric, testified concerning a payment in 1978 on a job at 800-812 South Pulaski after receiving a violation notice from Price. After a discussion Price told him that three people had to be taken care of: himself, Hunter and Howard, (other inspectors), and he had to give them each $200. He went out in the hall and gave Price $300, and later he gave Price some more money. He said he paid the money to Price because he felt the job would not have been approved if he hadn't paid. Over objection of the defendant, Hargrett was also allowed to testify that in November of 1968, ten years before the return of the indictment, pursuant to request by Inspector Nolan, he paid $400 through Price at the Electrical Inspection Bureau to approve a job. (Tr. 572, *et seq.*) The government submitted this testimony of an event that took place ten years before the return of the indictment under the auspices of Rule 404(b) of the Federal Rules of Evidence and for the state of mind of the witness. Again during the cross-examination of the witness, the Court told defense counsel that he had twenty minutes to go in his cross-examination after a very short period of cross-examination. During the defense, the government freely stipulated that Floyd Price did not begin his employ-

ment with the Bureau of Electrical Inspection until October 6, 1969, almost a year after the events which Mr. Hargrett testified took place in November of 1968. (Tr. 823-828.)

Interstate Commerce Witnesses

Clancy Weiss of Englewood Electrical Supply testified that he is Vice-President of Operations of Englewood Electrical Supply. They supply materials to Service Electric selling conduit and wire, and they receive their conduit and wire from out of state. (Tr. 189-200.)

Harvey Rice, president of Harlow Electrical Supply, testified that he distributes electrical products in the construction field in Chicago. Hargrett Electric is one of its customers. (Tr. 212.)

James Marra testified he was the owner of Southtown Electrical Supply and Southeast Electrical Supply and that they receive wire from Massachusetts, Georgia and Virginia. Their exhibits show purchases from out of state and that Lovchen Electric and Ray Lumovic are customers of theirs. Mr. Marra testified that Lee Roy Harper was a customer and he has supplied him with wire, conduit, fitting boxes and things of that nature but that Harper was an infrequent customer. (Tr. 227.)

Peter Kocoras of Great West Electrical Supply, which buys its wire from New York and Georgia, testified that Lovchen Electric was a regular account for about 8 to 10 years and that they received wire from an agent in Elk Grove Village, Illinois and conduit from Ohio. (R. 232-237.)

Defense

The defense consisted of character witnesses, a witness to impeach government witness Hargrett and a stipulation that Price did not begin his employment with the City of Chicago until October 6, 1969. (Tr. 823-828.)

REASONS FOR GRANTING THE WRIT

I.

THE DENIAL OF RIGHT OF CROSS-EXAMINATION OF A MAIN GOVERNMENT WITNESS WHICH SHOWED HIS BIAS CANNOT BE DEEMED HARMLESS ERROR.

The Seventh Circuit, while accepting petitioner's contention that the trial court did improperly curtail cross-examination of a main government witness which tended to show his bias, nonetheless held that the error was harmless (Opinion at 5). Petitioner respectfully maintains that the Seventh Circuit's decision is incorrect in light of this Court's rulings in *Davis v. Alaska*, 415 U.S. 348, 94 S.Ct. 1105 (1974) and *Alford v. United States*, 282 U.S. 687, 51 S.Ct. 218 (1931).

During cross-examination of Lee Roy Harper, a main government witness testifying about five of the eleven counts, counsel for the defendant was able to establish that Harper had not filed an income tax return for 1977 and was not sure whether he had filed one in 1976. (R. 372-373.) This admission came at the beginning of the cross-examination of Harper, at which time counsel for the defendant then asked a non-leading, non-suggestive question:

> "Did you ever have an occasion to discuss with any agent of the government, the United States government, the fact that you have not filed income tax returns for the year 1977 and maybe not for the year 1976?"

Without objection from the government, the Court then interjected and snapped at the defendant's counsel:

> The Court: "If the answer is no are you going to prove otherwise?"
>
> Mr. Hartigan: "I am not if the answer is no."
>
> The Court: "You cannot ask a question which suggests something and get a no answer and just leave it drop. If the answer is no are you going to prove to the contrary?"
>
> Mr. Hartigan: "No, Your Honor."
>
> The Court: "The question is stricken and the jury instructed to disregard it. It makes improper suggestion to the jury that it is not going to be followed up by proof from what I understand from counsel." (Tr. 374.)

Later, the Court for the same reason would not allow counsel to ask Harper if Price told him that most of the violations of the City Code were unenforceable. (Tr. 382.) Later, when defense counsel asked Harper if he had income tax problems, the Court again asked him if he was able to prove it if the witness denied it. When counsel pointed out that Harper had already testified that he had not filed for a particular year and may not have filed for another year, the Court again jumped in without objection from the government and instructed the jury to disregard it, and gave them a lecture on what the Court felt was the unethical behavior of defense counsel in asking a question which he could not follow up if the witness gave a negative answer.

By the actions of the Court in this and other matters which will be pointed out later, the defendant was denied his right of cross-examination guaranteed by the Sixth Amendment to the United States Constitution. In *Alford v. United States*, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 (1931), the witness was asked what would seem to be an innocuous question as to his address and the objection to that question was sustained. The United States Supreme Court, in reversing the conviction on the

ground that the defendant's right to cross-examination had been unconstitutionally curtailed, held that counsel for the most part explores in the dark, and that it is the essence of a fair trial that reasonable latitude be given the cross-examiner even though "he is unable to state to the court what facts the reasonable cross-examination will develop." The Court said that prejudice ensued from the denial of the opportunity to cross-examine and that the cross-examiner need not show where cross-examination would lead. *Alford* was reaffirmed in *Smith v. Illinois*, 390 U.S. 129, 19 L.Ed.2d 956, 88 S.Ct. 748 (1968).

The right to cross-examination is included in the Sixth Amendment to the Constitution with the accused's right to confront witnesses against him. *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). The defendant has a right to cross-examine key prosecution witnesses to show any bias the witness may have had because of a vulnerable status. *Davis v. Alaska*, 415 U.S. 348, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). And while it is recognized that the limitations of cross-examination are within the sound discretion of the court, that discretion must be exercised with due regard for the defendant's constitutional rights and after there has been sufficient opportunity to cross-examine. *United States v. Greenberg*, 423 F.2d 1106 (5th Cir. 1970); *Snyder v. Coiner*, 510 F.2d 224 (4th Cir. 1975).

It has been held to be error to refuse to permit the defendant to cross-examine the prosecution witness vigorously about a conviction in a prior case to show that the witness was testifying because of an expectation of leniency. *Bodine v. United States*, 368 F.2d 417 (5th Cir. 1966); *United States v. Standard Oil*, 316 F.2d 884 (7th Cir. 1963). Inquiries directed to the witness' interests, motives, prejudices or hostilities, or any

pertinent circumstances affecting the credibility of the witness, must be allowed to insure the defendant's right to confrontation of witnesses. *United States v. Lawinski*, 195 F.2d 1 (7th Cir. 1952). Further, complete foreclosure of cross-examination on a subject matter relevant to the witness' credibility, which may have deprived the jury of access to information bearing on the trustworthiness of crucial testimony, cannot be treated either as falling within the court's discretion or as harmless error. *United States v. Kartman*, 417 F.2d 883 (9th Cir. 1969).

Probably the case closest to the fact situation in the instant case is that of *United States v. Mayer*, 556 F.2d 245 (5th Cir. 1977). There the trial court would not allow the defense to go into the fact that the government dropped other charges against the defendant after she pled guilty to one charge. In reversing the conviction, the court, after setting forth the principles of law which we have set forth above, held that the right to cross-examination is especially important with respect to accomplices *or other witnesses who may have substantial reason to cooperate with the government*, and it is important that the defendant be allowed to search for a deal between the government and the witness even though no hard evidence of such deal exists. The court pointed out that it is not the actual existence of a deal that is important, but the witness' belief or disbelief that the deal exists. Citing *United States v. Onori*, 535 F.2d 938 (5th Cir. 1976). The Court again held that it avails the government little to say that the trial judge enjoyed discretion in determining the bounds of cross-examination. That discretion again does not come into play until there has been permitted as a matter of right sufficient cross-examination to satisfy the Sixth Amendment. Because the district court cut off cross-examination of a chief witness in trying to establish bias or motive to testify falsely, the conviction was reversed.

In the instant case, the witness Harper testified that he had not filed income tax returns for one year and may not have filed a return for another year. The wilful failure to file an income tax return is a federal offense punishable by imprisonment up to one year and by a fine. Title 26 U.S.C. Sec. 7201. Counsel was entitled to know whether or not Harper ever discussed that matter with the government, and if so, what that discussion consisted of. Counsel was probing in the dark, as the Supreme Court of the United States recognized most cross-examiners do. *Alford v. United States, supra.* There was no intimation in the question by counsel that there was such a conversation or that certain things were said during a conversation. The question was fair, and the question was proper. The court obviously confused its ruling with the rule of law which states that when an attorney lays a foundation for confronting a witness with an alleged prior statement which is inconsistent with the testimony of the witness and the witness denies making the statement, it is reversible error to fail to produce the person to whom the statement was purportedly made in order to contradict the witness. *United States v. Bohle,* 445 F.2d 54 (7th Cir. 1971).

There was nothing in the question asked by counsel which suggested to the jury an improper allegation or insinuation. Nothing he said could have led the jury to believe that there was a deal made by the government with Harper if Harper denied such a deal was made. In fact, a negative answer by Harper to the question would have strengthened Harper's testimony in that he would have been testifying without contradiction that there was no deal concerning his failure to file income tax returns. It would not be unfair, however, for defense counsel to delve into Harper's motive for cooperating with the government and having a tape

recorder placed on his body on two occasions and trying to transfer monies furnished to him by the FBI to Floyd Price. Could it not be that Harper was fearful that the agency of the federal government could see that he was prosecuted for failure to file his income tax returns, and that his cooperation would help him in that regard? Any cross-examination in this area would have been proper, but the court shut it off before it even began, again without objection from the government. We believe that the government was wise enough to believe that such inquiry was proper and that the question as put was proper.

The Seventh Circuit in *United States v. Ott,* 489 F.2d 872 (7th Cir. 1973), in an opinion written by Justice Stevens, held that in limiting the cross-examination of a witness as to whether or not he was an informer for the government violated constitutional right to cross-examination.

In *Alford* and *Ott, supra,* the questions concerned the witnesses' addresses and occupations, or whether the witness was a government informant. The court there held that cutting off of cross-examination on those questions was reversible error. In this case we have an even more important area, *i.e.,* whether the witness is seeking leniency or even immunity from prosecution in return for his favorable testimony for the government. There is no question based on the authorities cited above that defendant was denied very essential rights of cross-examination in this area. The error committed by the Court in limiting this cross-examination pervaded the whole trial, as counsel, from the outset of the cross-examination of the very first witness, was told that he could not ask any questions of a witness unless he was able to prove the falsity of a negative answer. It can be seen in reading the record in this case how counsel was

hampered in his cross-examination. The Court became very short with counsel for the defendant, and on occasions dealing with different witnesses set time limits at which point the Court stated cross-examination would be cut off. For witness Harper, the Court stated "You have another five minutes with this witness." (Tr. 452.) With the witness Hargrett, he was told he had 20 minutes left in his cross-examination, which had not been very lengthy up to that point. (Tr. 645-646.) In the cross-examination of Matthew Ott, the Court interjected questions to proper cross-examination and stated "I just want to shorten the time." (Tr. 756.)

The conduct of the court throughout the trial reflected that the speed of the trial is more important than the defendant's right to cross-examination. In addition to the chilling effect on cross-examination by involving an impossible and unconstitutional rule that counsel must be able to rebut a negative answer before he asks the question, the court put unreasonable time limits upon cross-examination. Cross-examination cannot be done by the clock, and sometimes it takes great prodding and persistent questioning to get an answer which would be favorable to the defendant and expose the witness' motives for testifying falsely or obtaining answers which would adversely affect the credibility of the witness. The defendant's right to cross-examine was totally emasculated by the court, which not only affected his cross-examination of Lee Roy Harper, but affected his cross-examination of all witnesses for fear of running afoul of the new rule of law promulgated by Judge Kirkland that one must not only be articulate but omniscient when asking questions of a government witness in a criminal case.

II.

THE SEVENTH CIRCUIT'S EXPANSION OF THE HOBBS ACT (TITLE 18 U.S.C. 1951) HAS IMPERMISSIBLY GONE BEYOND THE INTENT OF CONGRESS IN ENACTING THE STATUTE.

As this Court is aware, Hobbs Act jurisdiction has been invoked as the vehicle for a growing number of prosecutions of "public officials." This trend has been deemed by one jurist as "the Hobbs Act run rampant." *United States v. Cerilli*, 603 F.2d 415, 437 (Judge Aldisert's dissent) (3d Cir. 1979).[1]

Here, the "public official" is a City of Chicago electrical inspector. Petitioner does not dispute that he is a public employee whose acts are, under the proper circumstances, acts under color of official right as defined in 18 U.S.C. 1951(b) (2). However, in this case the Seventh Circuit Court of Appeals, in affirming the petitioner's conviction, has expanded the Hobbs Act to stand for the following propositions:

1. No inducement, coercion, or threat by a public official is required for conviction, and
2. Receipt of payments by a public employee from a person engaged in a wholly illegal business is proscribed by the Hobbs Act.

A.

A Conviction Under The Hobbs Act Cannot Stand When There Is Merely Evidence Of A Gratuity Paid To A Public Employee Without Some Evidence Of Compulsion, Inducement, Or Coercion By The Public Employee.

Raymond Lumovic of Lovchen Electric testified concerning Counts 2, 3 and 5. In mid-1975 he was doing a job at 929-935 North Sacramento in Chicago, a

[1] Any attempt to summarize the dissent in *Cerilli* would be inadequate; it is exhaustive, articulate and scholarly.

building whose owner had received a letter from the Chicago Building Department indicating violations of the Electrical Code. (Tr. 461.) Lumovic was hired to do the electrical work, and he obtained a permit for the job. When the job was completed he called for an electrical inspector to come out to inspect the job. Mr. Price came to the job,[2] confirmed that there were no problems with the job, and assured the owner that everything was all right. (Tr. 467-68.) He further testified that without request and without conversation Lumovic gave Price $100. Price took the money. (Tr. 470.) About a month later, there was an electrical job at 3745 West Hirsch in Chicago. When the job was finished, sometime in June of 1975, Price was called by Lumovic to visit the job for inspection purposes. Price went inside, inspected the job, said everything was fine, and again without conversation or request, Lumovic gave Price $30. (Tr. 471.) Sometime later, Lumovic was doing electrical work at 1537-43 East 63rd Street in Chicago, and again Price, who had been the inspector in that area at that time, was called to inspect the job to see that it was completed properly. He checked the job, and again without conversation and without request Lumovic gave Price $100. (Tr. 473.) When asked on direct examination why he gave the money to Price, Lumovic testified "I learned from the past that you cannot be in business for some of the jobs if you don't pay on the job or later for particular jobs." This testimony was received over the objection of the defendant, and a motion to strike the testimony was denied. (Tr. 474.) The witness further testified that if he did not pay this time, he would get a call back later and have to "pay twice something for the

[2] He originally called a Mr. Lowry, another inspector, but he was on vacation and Price came out instead. (Tr. 463.)

same job. (Sic.)" (Tr. 475.)[3] Again, a motion to strike the testimony was denied and objection to the testimony was overruled.

On cross-examination Lumovic admitted that Price never demanded any money from him and that he gave the money to him voluntarily. (Tr. 494.)

Based on the testimony of Lumovic, there is simply no evidence of extortion under color of official right. "Color of official right" has been defined as the coercive use of one's office to induce payments which would not otherwise be due to the public official in order that he do some public act which he is required to do or refrain from doing some public act which would bring economic loss to the victim. Unless the payments are made under some form of compulsion, however, there is no extortion. *United States v. Adcock*, 558 F.2d 397 (8th Cir. 1977); *United States v. Irali*, 503 F.2d 1295 (7th Cir. 1974); *United States v. Crowley*, 504 F.2d 992 (7th Cir. 1974). The courts, moreover, have found that a mere passive receipt of money does not establish extortion. In fact, the court in *United States v. Hathaway*, 534 F.2d 386 (1st Cir. 1975), held that an instruction by the trial court which told the jury that voluntary payment on the part of the so-called victim does not constitute extortion was a proper charge. In every case upon which there has been a conviction under this section of the Hobbs Act, there was at least some act on the part of the public official which induced the payment, and the mere receipt of money has never been enough to convict a public official of extortion.[4]

[3] It is unclear how if one had not paid in the first place he would have to pay "twice something for the same job."

[4] Mere receipt of money by a federal official has been held not to constitute extortion under color of official right under a comparable statute concerning federal officers. *United States v. Sutton*, 160 F.2d 754 (7th Cir. 1947).

In *United States v. Braasch*, 505 F.2d 139 (7th Cir. 1974), payments were made to keep police officers from harassing tavern owners; in *United States v. Crowley*, 504 F.2d 992 (7th Cir. 1974), payments were made for police protection; in *United States v. Kuta*, 518 F.2d 947 (7th Cir. 1975), payment was made after the defendant, an alderman of the City of Chicago, called the victim down to his office and then stated a figure of $1,500 when ~~the~~ victim asked how much was owed for the zoning change which had previously been put through by the alderman; in *United States v. Gill*, 490 F.2d 233 (7th Cir. 1973), the police officer, while not inducing the payment, increased the amount offered by the victim and then did not go through with an original plan to arrest the tavern owner for allegedly selling liquor to a minor. Extortion was also found where, in order to obtain contracts which had been denied, payment was taken and then the contracts were granted after the money was paid. *United States v. Price*, (no relation), 507 F.2d 1349 (4th Cir. 1974); *United States v. Harding*, 563 F.2d 299 (6th Cir. 1977).

In the instant case, Floyd Price did not withhold approval of the completed work awaiting payment, nor did he request payment, nor did he demand payment, nor did he set any figure that Mr. Lumovic would have to pay in order to keep peace with Floyd Price. Lumovic, based upon some notion placed in his head that he had to do this, gave Price the money, and while a public official should, under ideal circumstances, refuse the money, there are very few individuals in our society who will turn down money when it is handed to them. This is particularly so when the money is not handed to them to influence the performance of a duty which has already been performed. Such conduct would not even constitute bribery under the laws of the State

of Illinois. *Cf. People v. Jordan*, 15 Ill. App. 3d 672, 304 N.E.2d 713 (1st Dist. 1973); Chapter 38, Section 33-1(d), Illinois Revised Statutes. In *United States v. Rabbitt*, 583 F.2d 1014 (8th Cir. 1978), the Court reversed a Hobbs Act conviction where the money was paid to a public official who had no authority to do that which the payor requested. The Court did not hold that the mere receipt of money by a public official was *ipso facto* extortion under the Hobbs Act. The Court held that there must be some *quid pro quo* for the payment. There was none there and none in the instant case.

Lumovic handed Price monies without conversation and without request after Price had approved the work on the job. This Court would be stretching the Hobbs Act beyond any limit if these convictions were affirmed. This Court would then redefine the word "extortion" to include tips and Christmas presents, or even campaign contributions, which were given to public officials without request or demand after the matter under consideration had already been decided.

Three out of every four years is an election year in Chicago. During even-numbered years there are presidential and/or Congressional and State elections, while during one odd year there are mayoral and aldermanic elections. There is a constant flood of requests for campaign contributions for incumbents and those seeking public office. One would have to be very naive to believe that some campaign contributions are not made because of fear that were they not made some adverse consequence will befall the non-giver. Under the government's theory in this case, all campaign contributions given by an individual to a person who holds power over that individual's business would be extortion under the Hobbs Act if that business were engaged in interstate commerce.

The voluntary payment of monies to public officials who have already exercised their authority in favor of the taxpayer cannot be considered extortion without making all gifts or contributions to those public officials extortion as well. Congress obviously had no such intent, for each Congressman could be considered an extortionist under color of official right whenever he takes a campaign contribution from a person who later testifies that he gave the contribution for fear that if he did not something evil would befall him, or because "he was told that's how you do business in the city." The defendant's conduct regarding Lumovic can in no way be considered extortion.

B.

The Hobbs Act Was Not Intended To Reach Payments To A Public Employee By A Person Engaged In A Wholly Illegal Enterprise.

The allegations in the indictment concerning Counts 6, 7, 8 and 10 revolved around Lee Roy Harper, who said that on five occasions he paid money to Floyd Price.[5] Harper was an unlicensed contractor who flunked the examination to become a licensed contractor on more than one occasion and who was operating in violation of the City of Chicago law. Chicago Municipal Code, Chapter 86, Section 86-16 states:

> "It shall be unlawful for any person to engage in the business of electrical contractor . . . without being registered as an electrical contractor in the manner hereinafter set forth. . . ." Chicago Municipal Code, Chapter 86, Section 86-16.

Harper testified that he paid Price on the occasions referred to in his testimony in order to get permits and

[5] The fifth occasion gave rise to Count 9, which was dismissed by the trial judge. (Tr. 439.)

so that he would not be arrested or fined and to stay out of court. (Tr. 292.) The simple fact of the matter is that Harper was not legally engaged in commerce and should not have been engaged in commerce without complying with the law (there is serious question as to whether Harper was engaged in commerce; see argument below). His payments to Price were not as a result of the coercive use of Price's office which required monies to do that which he was entitled to do, but instead he paid monies to do that which he was not entitled to do. The Seventh Circuit has recognized that distinction on two separate occasions. In *United States v. Staszcuk*, 502 F.2d 875 (7th Cir. 1974), the Court unanimously held that where a public official has been paid a sum of money to induce him to use his position and influence to obtain a building permit on behalf of a person who is clearly not entitled under the law to such a permit, there is no extortion under color of official right, but merely bribery. That language comes from the concurring opinion of Judge Campbell, to which the other justices on the Court, Justice Sprecher and Justice Pell, stated "we wish to note our concurrence in Judge Campbell's concurring opinion," 502 F.2d at 882. That holding by Judge Campbell, concurred in by the other two justices, is a reaffirmance of *United States v. Pranno*, 385 F.2d 387 (7th Cir. 1967), wherein it was said that it might be solely a bribe and not extortion if the record showed the issuance of the permit was illegal. 385 F.2d at 390.

It was clear that the law of the Seventh Circuit (prior to this decision) was that when someone who is illegally engaged in the business and pays a public official for the right to continue to engage in that business illegally, there is no coercive use of the public official's office, and that the monies paid were not as a result of "extortion" as defined by the Hobbs Act. While under certain

circumstances we recognize that the distinction between bribery and extortion is immaterial, such as the situation in *United States v. Braasch*, 505 F.2d 139 (7th Cir. 1974), where the victim is legally engaged in the business but pays to stop the coercive use of the public official's office, the distinction has not been totally obliterated. In *United States v. Addonizio*, 451 F.2d 49 (3rd Cir. 1974), the Court also recognized again the distinction between bribery and extortion concerning the legality or illegality of the payor's business.

If this Court were to hold otherwise, it could mean that payoffs by burglars who purchased their burglar tools from out of state or armed robbers who purchased their guns from out of state could constitute extortion under the color of official right when those payments were made to police officers to look the other way while they went about their illicit trades. Congress never intended that result, and no case law dictates that result. Cases in which this Circuit has upheld Hobbs Act convictions involved persons, legally engaged in business, who pay to stop police harassment, *United States v. Braasch, supra;* (payment to obtain a license to engage in a legitimate business), *United States v. Irali*, 503 F.2d 1295 (7th Cir. 1974); (payment for police protection to which they were already entitled), *United States v. Crowley*, 504 F.2d 992 (7th Cir. 1974); (payment for zoning changes for their legitimate businesses), *United States v. Kuta*, 518 F.2d 947 (7th Cir. 1975); *United States v. Staszcuk*, 502 F.2d 875 (7th Cir. 1974).

This appeal is not taken in defense of the conduct of Floyd Price. This appeal is not taken to condone alleged corruption by state or city officials. This appeal is taken because of the unwarranted invasion of the federal and state relationship by allowing federal convictions to

stand under the guise of violations of the Hobbs Act when Congress never intended the Act to apply to those situations. Congress never intended the illegal entrepreneur to be protected by the Hobbs Act, nor did it intend to treat as criminal extortion the mere giving of gratuities to public officials, even to keep them in their good graces, when such monies were never extorted or demanded from the citizens.

The rules governing cross-examination in this case were an atrocity, and this is compounded by the Seventh Circuit Court of Appeals' decision affirming the conduct of the trial court.

CONCLUSION

For the above reasons, petitioner respectfully requests this Court issue a writ of certiorari to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

(Argued September 28, 1979)

October 22, 1979.

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. PHILIP W. TONE, *Circuit Judge*
Hon. ROBERT A. GRANT, *Senior District Judge**

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 79-1480 vs.

FLOYD PRICE,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 78-CR-781—ALFRED W. KIRKLAND, *Judge.*

ORDER

(Unpublished Order Not To Be Cited
Per Circuit Rule 35)

Defendant Floyd Price, formerly an inspector for the Chicago Bureau of Electrical Inspection, was convicted by a jury on ten counts of extortion under color of official right in violation of the Hobbs Act, 18 U.S.C.

* The Honorable Robert A. Grant, Senior District Judge of the United States District Court for the Northern District of Indiana, is sitting by designation.

§ 1951 (a).[1] Price's conviction arose out of a series of transactions in which he accepted illegal payments from electrical contractors while acting as an inspector. Price was sentenced to 18 months imprisonment on each count, the sentences to run concurrently.

On appeal, Price argues that his conviction should be reversed due to an insufficiency of evidence on seven counts, a violation of his Sixth Amendment right to cross-examine witnesses, the wrongful admission into evidence of similar past acts on his part, and the failure of the trial court to conduct a voir dire of the jury to determine whether they had been improperly influenced by viewing the transcript of a tape not admitted into evidence. We affirm the judgment of conviction on all counts.

A. *Insufficiency of the Evidence on Counts Six, Seven, Eight, and Ten*

Price first contends that the testimony of Lee Roy Harper, the Government's principal witness on the above four counts of the indictment,[2] was insufficient as a matter of law to justify his conviction on these counts. Price's argument is in two parts. First, he contends that Harper was not legally entitled to the electrical permits that Price obtained for him, and that this fact removes Price's actions from the realm of "extortion" as pro-

[1] 18 U.S.C. § 1951(a) provides, in pertinent part,

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by extortion . . . shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

18 U.S.C. § 1951 (b) (2) defines "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." The present case involves only the "under color of official right" component of extortion under the Hobbs Act.

[2] Harper was also the chief witness on Count Nine of the indictment, but this count was dismissed during trial because it was fatally at variance with the prosecution's evidence.

hibited by the Hobbs Act.[3] Second, Price argues that there was insufficient evidence to support a finding of an effect on interstate commerce, as is required by the Hobbs Act. Neither claim has merit.

In *United States v. Braasch*, 505 F.2d 139 (7th Cir. 1974), *cert. denied*, 421 U.S. 910 (1975), we rejected the notion that, under the Hobbs Act, it matters "whether the public official induces payments to perform his duties or not to perform his duties, or even, as here, to perform or not to perform acts unrelated to his duties which can only be undertaken because of his official position." 505 F.2d at 151. The fact that Price provided permits to Harper in violation of the law will, thus, avail him nothing. He was able to provide the permits due to his official position. The "motivation for the payment focus[ed] on the recipients's office." *Id.* As we noted in *Braasch*, "[t]hat such conduct may also constitute 'classic bribery' is not a relevant consideration." *Id.* Any statements in *United States v. Staszcuk*, 502 F.2d 875, 882-83 (7th Cir. 1974) (Campbell, J., concurring), *aff'd in part and rev'd in part on other grounds*, 517 F.2d 53 (7th Cir.) (*en banc*), *cert. denied*, 423 U.S. 837 (1975), and *United States v. Pranno*, 385 F.2d 387, 390 (7th Cir. 1967), *cert. denied*, 390 U.S. 944 & 972 (1968), that are arguably contrary to our holding in *Braasch* are dicta and not controlling.

Price's argument concerning the jurisdictional nexus with interstate commerce is similarly flawed. In *United States v. Braasch*, 505 F.2d at 147 (quoting *United States v. DeMet*, 486 F.2d 816, 822 (7th Cir. 1973), *cert. denied*, 416 U.S. 969 (1974)), we said: "Because Congress has seen fit to exercise its full power under the commerce clause, extortionate conduct having an arguably *de minimis* effect on commerce may nevertheless be punished." The record indicates that Harper bought copper wire and conduit for his business, including the

[3] Harper was not entitled to the permits because he was not licensed to do electrical work in Chicago. The permits obtained for him by Price evidently were issued in the name of an electrical contractor that was so licensed.

jobs to which the offenses charged in the indictment related, and that such materials usually or always came into Illinois through interstate commerce. This was sufficient even though Harper's purchases may have been "infrequent." Nor does the record indicate a reason to suspect that an effect on interstate commerce was not "at least a 'realistic probability' at the time of the extortionate act." *United States v. Elders*, 569 F.2d 1020, 1024 (7th Cir. 1978) (quoting *United States v. Staszcuk*, 517 F.2d 53, 60 (7th Cir.) (*en banc*), *cert. denied*, 423 U.S. 837 (1975)). The jurisdictional requirement of an effect on interstate commerce therefore was satisfied.

B. *Insufficiency of the Evidence on Counts Two, Three, and Five*

The Government's principal witness on these counts was Raymond Lumovic, an electrical contractor who testified that he paid Price money on three occasions. On the first of these occasions, Lumovic said he told Price that the money was not to induce him to overlook electrical code violations, but was rather "for the principle that in Chicago that I got to do it and that's all." Price contends that this testimony did not demonstrate that he coerced or induced the payments, and that his conduct in accepting them is therefore not violative of the Hobbs Act. We reject this contention for two reasons.

First, the jury could reasonably have concluded that Price did in fact induce Lumovic's payments. Lumovic testified that he informed Price of the purpose of the payments, and further testified that he had learned that if he did not pay off the electrical inspectors at once he would later have to pay "twice something for the same job." Price could have refused the money. He could have informed Lumovic that he had nothing to fear from electrical inspectors. Instead, he accepted the money, and the jury was entitled to conclude that this action was simply the manifestation of an unspoken threat.

Although the foregoing is sufficient to dispose of this issue, we note that the cases cited by Price do not compel the conclusion that inducement or coercion is necessary to support a conviction for extortion under color of official right. In *United States v. Crowley*, 504 F.2d 992 (7th Cir. 1974), we found that,

> Extortion under color of official right . . . need not involve force or threat. If a victim reasonably feels compelled to pay money to . . . [an official] because of that . . . [official's] wrongful use of his official position for the purpose of obtaining money, the requirements of the crime of extortion under color of official right are satisfied.

Id. at 995 n.5. Similarly, in *United States v. Braasch*, *supra*, 505 F.2d at 151, Mr. Justice Clark wrote for this court: "So long as the motivation for the payment focuses on the recipient's office, the conduct falls within the ambit of 18 U.S.C. § 1951. That such conduct may also constitute 'classic briber[y]' is not a relevant consideration." Though some cases contain language arguably contrary to this position, *e.g.*, *United States v. Adcock*, 558 F.2d 397, 403-04 (8th Cir.), *cert. denied*, 434 U.S. 921 (1977), we adhere to the view expressed in *Braasch*. Price accepted money wrongfully and with the knowledge that it was paid to induce him to perform or to fail to perform official functions. This was enough to constitute extortion under the Hobbs Act.

C. *The Right to Cross-Examine Witnesses*

Defendant next argues that the trial judge improperly restricted his cross-examination of the witness Harper by refusing to permit a question asking the witness whether he and federal officials had discussed his failure to file income tax returns. The ultimate goal of this line of inquiry, we are told, was to determine whether the witness had been influenced by an expectation or hope of leniency concerning his tax reporting omissions. The ruling was not reversible error. In *United States v. Amabile*, 395 F.2d 47, 50-52 (7th Cir. 1968), *vacated and remanded on other grounds sub nom.*,

Giordano v. United States, 394 U.S. 310 (1969), we held that it was not error to refuse to permit a defendant to impeach a Government witness with evidence that, *inter alia*, the witness was being investigated by federal tax authorities. The court there concluded that the attempt to inquire into tax matters was of "slight bearing on the bias and credibility" of the witness, 395 F.2d at 52 n.4 (quoting *District of Columbia v. Clawans*, 300 U.S. 617, 632 (1937)), because the United States Attorney does not control Internal Revenue Service investigations and because such investigations "are common and usually involve no threat of an indictment." 395 F.2d at 51. We believe *Amabile* controls the instant case. Price's counsel sought to impeach Harper with material even less indicative of bias than that present in *Amabile*. Harper was, apparently, not even the subject of an IRS investigation.

Also, in the case at bar the particular question asked was merely preliminary to the ultimate question of whether Harper had been influenced by an expectation or hope of leniency. The trial judge recognized the legitimacy of the ultimate inquiry into bias, as is demonstrated by the cross-examination of the witness Lumovic, and presumably would have permitted such an inquiry of Harper if it had been attempted. Thus, although we cannot concur in the trial judge's view that defense counsel's preliminary question concerning a meeting with government officials was improperly suggestive, the record as a whole does not support the claim of error.

Finally, we note that defense counsel was able to bring out the fact that Harper failed to file income tax returns in 1977 and perhaps in 1976. The jury was thus likely to infer that Harper's vulnerability to prosecution would tend to have a chastening effect on his testimony. We doubt that anything Harper might have said would have added much. In view of all this, we cannot say that Harper's Sixth Amendment rights were violated.

D. *Evidence of Prior Similar Acts*

Price next contends that the trial court twice erred in admitting evidence of Price's past acts of receiving money under color of office. The first of these alleged errors occurred when James Hargrett, an electrical contractor who testified with respect to Count Eleven, was permitted to testify that he had paid Price $400 in November of 1968 to secure approval of electrical work. This payment was not one of those charged in the indictment. The second alleged error occurred when Matthias Ott, an electrical contractor who testified concerning Counts One and Four, was allowed to testify that he paid Price money in 1972 to obtain approval for electrical work. This transaction also was not charged in the indictment. Price contends on appeal that testimony as to these two transactions was improperly received under Federal Rule of Evidence 404(b) because it was not relevant to any material issue in the case, because its probative value was outweighed by its prejudicial effect, and because the trial court did not sufficiently balance probative value against prejudicial effect and did not, *sua sponte*, instruct the jury on the limited purpose for which the testimony was admitted. We see no merit in these contentions.

First, the evidence of prior similar acts was relevant to two material issues in the case. In a Hobbs Act prosecution for extortion under color of official right, the Government must prove that the victim paid money to the defendant because of the defendant's official position. Evidence of the victim's state of mind is thus an essential element of the Government's case. *See United States v. Braasch*, 505 F.2d 139, 151 (7th Cir. 1974), *cert. denied*, 421 U.S. 910 (1975). In addition, the Government must prove criminal intent on the part of the accused. *See United States v. Adcock*, 558 F.2d 397, 402 (8th Cir.), *cert. denied*, 434 U.S. 921 (1977). The prior acts tended to prove that the victims in question knew Price would accept money to perform official functions, and therefore that they made the payments charged in the indictment to influence Price's official

actions. The prior acts also tended to prove that Price accepted the payments knowing their purpose, and thus possessed the requisite criminal intent.

Price contends, however, that his intent was not a real issue because his defense as to these counts was that he did not take the money, and not that he took it without the requisite intent. Price's counsel did suggest to the jury that intent was an issue, however. In his opening statement, defense counsel referred to the possibility that the jury might find payments in the case to have been "gifts" or "contributions." In cross-examining the witness Lumovic, counsel asked whether Lumovic knew if Price "was going to keep that money, give it to charity or whatever." Counsel also called two character witnesses for the defense and elicited from both the fact that Price was engaged in "fund raising" for social organizations. Even if the defense had not treated intent as a real issue, our decision in *United States v. Weidman*, 572 F.2d 1199, 1201-02 (7th Cir.), *cert. denied*, 439 U.S. 821 (1978), would allow the Government to come forward with evidence concerning intent. In a Hobbs Act prosecution, no less than in a federal mail fraud prosecution, the Government is required to prove criminal intent on the part of the accused.

In light of its probative value, we cannot say that the evidence of similar past acts was substantially outweighed by the danger of unfair prejudice. It is true that the trial judge did not expressly state his reasons in the balancing of probative value and unfair prejudice under Rule 403, Fed. R. Evid., which he should have done, *see United States v. Dolliole*, 597 F.2d 102 (7th Cir. 1979). We will not, however, presume the wrong reasons, when the correct ones are apparent.

Neither was the trial court required *sua sponte* to give a limiting instruction as to the use of the testimony. Defense counsel never requested such an instruction, but rather chose to stand or fall on the issue of admissibility; indeed, this stand was taken after the Government had conceded the propriety of a limiting instruction. Though a limiting instruction would have been highly desirable,

see United States v. Braasch, *supra*, 505 F.2d at 149, under such circumstances the trial court was not required to override the wishes of defense counsel. We find no error sufficient to warrant reversal in the admission of the prior acts.

E. *Failure to Voir Dire the Jury*

Price's last allegation of error involves the following sequence of events: The trial judge admitted into evidence a tape recording of a conversation between Price and Harper. Copies of a transcript of the taped conversation were distributed to the jury. Upon playing the tape in open court, however, the judge ruled that the recording was incomprehensible and could not go into evidence. The tape was stopped and the transcripts were collected from the jury. While the jury had the transcript, however, they had an opportunity to read it or at least part of it. Defense counsel's request for a voir dire of the jury to determine whether they had been prejudiced by the contents of the transcript was denied by the judge.

In support of the proposition that the denial of the voir dire is reversible error, Price cites cases that involve documents not in evidence that were allowed to go to the jury room during deliberations. Here the tape and the transcript were withdrawn from the jury's consideration and the jury was instructed to disregard them. The transcript is like any item of evidence that is stricken with an instruction to disregard. The court is not required to interrogate jurors whenever evidence is stricken. The transcript did not, of course, go to the jury room. Moreover, defendant has pointed to nothing in the transcript that would have unfairly prejudiced him if the jury had disobeyed the court's instructions.

For all of the foregoing reasons, the judgment of the trial court is affirmed.

AFFIRMED.

Unpublished Per Curiam Order

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
October 22, 1979.

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. PHILIP W. TONE, *Circuit Judge*
Hon. ROBERT A. GRANT, *Senior District Judge**

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 79-1480 vs.

FLOYD PRICE,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 78-CR-781—ALFRED W. KIRKLAND, *Judge.*

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the order of this court entered this date.

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* Honorable Robert A. Grant, Senior Judge, United States District Court for the Northern District of Indiana, sitting by designation.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 5, 1979.

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. PHILIP W. TONE, *Circuit Judge*
Hon. ROBERT A. GRANT, *Senior District Judge**

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 79-1480 vs.

FLOYD PRICE,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 78-CR-781—ALFRED W. KIRKLAND, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing in banc filed in the above entitled cause by defendant-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable Robert A. Grant, Senior District Judge of the United States District Court for the Northern District of Indiana, is sitting by designation.

APPENDIX C

CONSTITUTIONAL PROVISION

Amendment VI [1791]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the Witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATUTORY PROVISIONS

18 U.S.C. Section 1951

§ 1951. Interference With Commerce By Threats Or Violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

Chapter 38, Section 33-1
Illinois Revised Statutes

33-1. § 33-1. Bribery. A person commits bribery when:

(a) With intent to influence the performance of any act related to the employment or function of any public officer, public employee, juror or witness, he promises or tenders to that person any property or personal advantage which he is not authorized by law to accept; or

(b) With intent to influence the performance of any act related to the employment or function of any public officer, public employee, juror or witness, he promises or

tenders to one whom he believes to be a public officer, public employee, juror or witness, any property or personal advantage which a public officer, public employee, juror or witness would not be authorized by law to accept; or

(c) With intent to cause any person to influence the performance of any act related to the employment or function of any public officer, public employee, juror or witness, he promises or tenders to that person any property or personal advantage which he is not authorized by law to accept; or

(d) He receives, retains or agrees to accept any property or personal advantage which he is not authorized by law to accept knowing that such property or personal advantage was promised or tendered with intent to cause him to influence the performance of any act related to the employment or function of any public officer, public employee, juror or witness; or

(e) He solicits any property or personal advantage which he is not authorized by law to accept pursuant to an understanding that he shall influence the performance of any act related to the employment or function of any public officer, public employee, juror or witness.

(f) Sentence.

Bribery is a Class 2 felony.

Amended by P.A. 80-1099, § 1, eff. Feb. 1, 1978.

P.A. 80-1099, § 1, eff. Feb. 1, 1978.

P.A. 80-1099, § 1, incorporated the amendment made by P.A. 80-922, § 1.